Supreme Court, U. S.
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In the Supreme Court of the United States

October Term, 1978
No. 79-122

ELIJAH W. RATCLIFF,
Petitioner

vs.

WILLIAM J. ESTELLE, JR., Director of the Texas Department of Corrections,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

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No.

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Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

This Petition is from a decision of the United States Court of Appeals, Fifth Circuit, dated June 20, 1979, wherein Petitioner was the Appellant and Respondent was the Appellee, docketed as No. 78-1870 before such Court, and not yet reported. A certificate of probable cause was granted pursuant to the application of Petitioner on April 3, 1978 in consolidated proceedings from the United States District Court for the Southern District of Texas at Hous-

ton, Texas. The initial application was docketed as Civ. No. 75-H-1945 in the United States District Court and as No. 77-8424 in the United States Court of Appeals, and the second application was docketed as CA No. H-77-1542 in the United States District Court and as No. 78-8093 in the United States Court of Appeals. The habeas corpus action in the United States District Court in both instances sought relief from a judgment of the District Court of Montgomery County, Texas, No. 11,064, returning a conviction on a theft indictment which was affirmed by the Court of Criminal Appeals of Texas, No. 47,600, reported as *Ratcliff v. Texas,* 504 S.W. 2d 883 (1974), and which the Supreme Court of the United States declined to review under No. 74-5595 and No. 75-208, on direct appeal, and No. 77-1594, seeking a review of the decision of the United States Court of Appeals dismissing the initial habeas corpus review application, No. 77-8424. The proceedings in the Supreme Court of the United States were reported as *Ratcliff v. Texas,* 419 U.S. 1103 (1975), 42 L.Ed. 2d 815, 95 S.Ct. 796, reh. den. 420 U.S. 939, 43 L.Ed. 2d 418, 95 S.Ct. 1153, and 423 U.S. 910 (1975), 46 L.Ed. 2d 147, 96 S.Ct. 227, respectively, and *Ratcliff v. Estelle,* U.S. (1978), 58 L.Ed. 2d 115, 99 S.Ct. 90. No formal opinion accompanied either of the orders by the United States District Court for the Southern District of Texas, Houston Division.

JURISDICTION

This Petition for Writ of Certiorari seeks review of a judgment and opinion rendered and entered on June 20, 1979 by the United States Court of Appeals for the Fifth Circuit and is pursuant to Title 28, United States Code, Section 1254(1). The United States Court of Appeals, Fifth Circuit, affirmed an order by the United State District Court for the Southern District of Texas, Houston Division, Civ. No. H-77-1542, dismissing a meritorious habeas corpus action based upon timely contested grand jury systematic exclusion, *Alexander v. Louisiana,* 405 U.S. 625 (1972), 31 L.Ed. 2d 536, 92 S.Ct. 1221, unconstitutionally vague statutory authority as applied to Petitioner, *Bouie v. City of Columbia,* 378 U.S. 347 (1964), 12 L.Ed. 2d 894, 84 S.Ct. 1697, and the abuse of State evidentiary rules where the State's evidence was fundamentally insufficient, *Blankenship v. Estelle,* 545 F.2d 510 (1977); *Thompson v. Louisville,* 362 U.S. 199 (1960), 4 L.Ed. 2d 654, 80 S.Ct. 624; *Lockett v. Blackburn,* 571 F.2d 309 (1978); Title 42, United States Code, Sections 1981-1995, inclusive with repealed sections; United States Code, Const. Amend. V, VIII, XIII, XIV and XV.

QUESTIONS PRESENTED

I. The systematic exclusion of Petitioner's peers from the material Polk County, Texas Grand Jury in a factually defective indictment against Petitioner.

II. The statutory authority upon which the State of Texas relied as applied to Petitioner in the subject conviction was unconstitutionally vague under Federal standards of due process.

II. The trial Court abused its discretion surpassing constitutional dimensions in refusing to routinely permit Petitioner's tax records to raise a jury issue of failure of consideration, contravening fundamental fairness.

IV. The trial Court fundamentally abused its discretion contrary to the process requirements by permitting the jury to consider an unrelated and distinguished transaction wherein Petitioner exercised rights of a payor on a negotiable instrument.

V. The trial Court proceedings were calculated through official neglect and disregard or design and intent to deprive Petitioner of due process globally.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The actions by the official of the State of Texas giving rise to this petition deny Petitioner the constitutional protection of United States Code, Const. Amend. V, VIII, XIII, XIV and XV as further enabled by Title 42, United States Code, Sections 1981-1995, inclusive with the substantive objectives of the repealed sections which have been supplemented by general procedures and case law. Petitioner's State remedies were exhausted pursuant to Vernon's Ann. C.C.P., Art. 11.01-11.64, inclusive, and an original and subsequent Federal habeas corpus actions were initiated and adjudicated under Title 28, United States Code, Sections 2241-2254, inclusive. Certain related causes of action have been asserted below by Petitioner under Title 28, United States Code, Sections 1343, 1443, 1446, 1447(d), 1449, 1651 and 1652. However, each of those provisions are now emphasized to be secondary and supportive of Petitioner's habeas corpus action. State authorities of precedential value upon which Petitioner relies are Vernon's Ann. C.C.P., Art. 5.01; V.T.C.A., Bus. & C. §§2.601, 2.606, 2.608, 2.721, 3.409, 3.417, 4.303 and 4.403; and Vernon's Ann. Civ. St., Art. 3713, Rules 5 and 6. The statutes which the State of Texas applied unconstitutionally are Vernon's Ann. P.C., Art. 1410 and 1413. Each of the foregoing substantive provisions is set forth in Appendix B attached hereto, except for the provisions of Vernon's C.C.P. as no question regarding such has arisen.

STATEMENT OF CASE

Petitioner is illegally restrained in his liberty by Respondent, William J. Estelle, Jr., Director of the Texas Department of Corrections as an official of the State of Texas, by virtue of a judgment of the District Court of Montgomery County, Texas, No. 11,064, Ninth Judicial District, directing Petitioner to serve six (6) years in the Texas Department of Corrections on a charge of theft. Sentence under the judgment was pronounced under date of July 26, 1972 (No. 47,600, Tr. Item 61, pp. 150-151), in response to a verdict of guilty upon a plea of not guilty before a jury under the Honorable J. S. Holleman, Presiding Judge, where the evidence properly adduced at the trial showed that Petitioner in stopping payment on a check tendered in consideration of a motor vehicle which proved substantially defective without the opportunity for prior inspection legally exercised the rights of a purchaser under the Texas Business and Commerce Code and the Uniform Commercial Code (No. 47,600, SF pp. 70-78; p. 80; p. 87; p. 110; and pp. 174-186).

Negro Citizens are denied privity with Grand Jury activities in Polk County, Texas so no opportunity to comply strictly with Vernon's Ann. C.C.P., Art. 19.27, was ever presented. However, a pre-trial motion seeking dismissal of the indictment for reasons of systematic exclusion of Plaintiff's peers from Grand Jury participation among other points including the unconstitutionality of contemplated authority for the indictment, raised in a removal action was specifically and formally denied by

Judge Ernest Coker, Sr., the original Presiding Judge, in a gesture filled summary fashion (No. 47,600, Tr. Item 19, pp. 52-63, Item 31, p. 89, and Item 35, p. 97, SF pp. 1-2 of motion Docket 5/11/1972). *Norris v. Alabama,* 294 U.S. 587 (1935), 79 L.Ed. 1074, 55 S.Ct. 579. Similarly, motions for a change of venue were improperly denied even though hearings were set and held on the motions (No. 47,600, Tr. Item 27, pp. 79-82, and Item 28, pp. 83-84). Vernon's Ann. C.C.P., Art. 31.01-31.07.

The trial itself was, also, characterized by multiple errors. One such error was the refusal of the trial Court to sequester the petit jury. Vernon's Ann. C.C.P., Art. 35.23.

The initial error which Petitioner has characterized as fundamental was the abuse of State evidentiary rules regarding the refusal of Petitioner's tax records and the admission of an unrelated and distinguishable transaction wherein Petitioner exercised rights of a payor (No. 47,600, SF pp. 90-91 and 176-186). V.T.C.A., Bus. & C., §§2.601(a) and 4.403.

The Presiding Judge refused motions for judgment upon the evidence (No. 47,600, SF pp. 66-69, and 133-135), for a new trial (No. 47,600, Tr. Item 63, pp. 156-161) and in arrest of judgment (No. 47,600, Tr. Item 62, 152-155), all timely presented. Such rulings were grossly erroneous for the reasons mentioned above in addition to the irregularities set forth hereafter in this statement of case.

One such additional irregularity impeaching the integrity of the trial Court was the inability of the complaining witness, Leonard Hodges, to identify the vehicle allegedly taken through theft in light of the ruling on the

motion for judgment after the prosecution had initially rested (No. 47,600, SF p. 38 and pp. 66-69). Similarly, the complaining witness' acknowledgement that he made multiple independent examinations of the subject draft without reliance on Petitioner supported the motion for judgment by Petitioner (No. 47,600, SF p. 42 and pp. 51-52).

Other trial errors were the denial of Petitioner's motion to question an employee of the complaining witness, Gilbert Woods of Goodrich, Polk County, Texas, as an adverse witness (No. 47,600, SF p. 73), Vernon's Ann. C.C.P., Art. 38.01 and *Webb v. State,* 7 S.W.2d 562 (1928), and allowing hearsay evidence to dominate the minds of the jury (No. 47,600, SF p. 123), *O'Beirne v. State,* 365 S.W. 2d 787 (1963). Also, it was prejudicial for the trial Court to refuse a compulsory answer by witness B. A. Hunter to the questions of Petitioner (No. 47,600, SF p. 129).

Jury argument irregularities included repetitious interruptions by the prosecutors, apparently to curry favor with the jury (No. 47,600, SF p. 151); the extension of the prosecutors' argument to contexts unrelated to and inconsistent with trial evidence (No. 47,600, SF pp. 154-157); and the comparable extension of the argument to speculation on law by the prosecutors (No. 47,600, SF pp. 160-161), even though similar more appropriate argument was declined Petitioner (No. 47,600, SF p. 152). 56 Tex. Jur. 2d Trial §240.

Finally, a category of clerical omissions and alterations occurring after the trial and which Petitioner has had only a post-conviction opportunity to contest, accompanies this petition for review.

The perpetrator of the omissions and alterations complained of is the official Court Reporter for the Ninth Judicial District, Montgomery County Texas, Mary Frances Dameron, who omitted Petitioner's exception to leading questions of law directed to the complaining witness (No. 47,600, SF p. 55). Vernon's Ann. P.C., Art. 37.09 and 37.10. This type of irregularity was repeated with respect to the submission of the jury charge to the trial Court as the full discussions surrounding the requested charge to the jury, both in open court and in chambers which she was in fact recording. Also, she struck the prefix "in" from "inconsistent" to avoid Petitioner's objection to arguments by the prosecutors which were inconsistent with the evidence received during presentation of cases (No. 47,600, SF pp. 154-157).

The trial Court judgment was appealed to the Court of Criminal Appeals of Texas and affirmed. *Ratcliff v. Texas,* 504 S.W.2d 883 (1974). A timely appeal was then perfected to the Supreme Court of the United States, but officials and employees of Respondent precluded preparation of a timely jurisdictional statement so a Petition for Writ of Certiorari was finally submitted to this Court, on direct appeal. *Ratcliff v. Texas,* 419 U.S. 1103 (1975), 42 L.Ed 2d 815, 95 S.Ct. 796, reh. den. 420 U.S. 939 (1975), 43 L.Ed. 2d 418, 95 S.Ct. 1153; *Ratcliff v. Texas,* 423 U.S. 910 (1975), 46 L.Ed. 2d 147, 96 S.Ct. 227. Each of the points presented to the trial Court was presented to the appellate courts on direct appeal in addition to the point regarding delay occasioned by officials of Respondent being presented to the Supreme Court of the United States.

Following refusal of the Supreme Court of the United States to review the proceeding on direct appeal, a writ of habeas corpus was sought from the United States District Court for the Southern District of Texas, Houston, Division, which improperly refused to entertain an initial application on grounds of exhaustion of State remedies without allowing a hearing for Petitioner to subpoena evidence establishing the exhaustion of State remedies and a second application was dismissed, but exhaustion of State remedies was conceded in the second proceeding. An appeal was taken from both proceedings to the United States Court of Appeals, Fifth Circuit, where they were consolidated, and a certificate of probable cause granted in the latter.

The entire State and Federal court record was before the United States Court of Appeals, but it elected to affirm the United States District Court while addressing only one of the five specific issues raised by Petitioner and deciding even that one point contrary to precedent in the Fifth Circuit as well as the Supreme Court of the United States. *Ratcliff v. Estelle,* U.S. (1978), 58 L.Ed. 2d 115, 99 S.Ct. 90.

GROUNDS SUSTAINING GRANTING THE WRIT

SUMMARY OF ARGUMENT

Petitioner was subjected to criminal sanctions purportedly under the Texas theft statutes which were unconstitutionally applied to his lawful conduct in stopping payment on a check against a solvent account tendered for a motor vehicle which proved unacceptable without the opportunity for prior inspection. Each stage of the proceeding before the State judiciary was characterized by fraud, neglect and a conspiracy to deprive Petitioner of due process. Title 42, United States Code, Sections 1981, 1982 and 1983.

The initial deprivation consisted of the systematic exclusion of Petitioner's peers, Negro citizens, from the Polk County, Texas Grand Jury relevant to the subject indictment, and the State courts, with the abstention of the United States District Courts, have avoided all procedures, including discovery, to effectively establish such illegalities through competent evidence.

After the indictment was returned, discovery efforts were ignored both in the District Court of Polk County, Texas, No. 9432, and the United States District Court for the Southern District of Texas, Houston Division, Cr. No. 71-H-228, which latter court remanded the proceeding to the State court after discovery efforts were in motion but before the time to respond deadline transpired. Federal

Rules Civ. Proc., Rule 33, 28 U.S.C.; Vernon's Ann. Rules Civ. Proc., Rule 168.

Other pre-trial procedures in the State courts, including a motion seeking dismissal or quashing of the indictment and motions for change of venue, were similarly reduced to jest. United States Code, Const. Amend. V and XIV.

During the trial, the mockery of justice was continued with perjured, inconsistent testimony by the State's witnesses and the trial Court's refusal to allow Petitioner to raise the issue of failure of consideration with respect to the check which was the alleged medium of theft. V.T.C.A., Bus. & C., §§3.409, 3.417, 4.303 and 4.403; Vernon's Ann. P.C., Art. 5.01.

Honoring well established precedents among Texas legal authorities would have effected a reversal of the trial Court's judgment in spite of the attending instances of fraud and deception by State trial officials, but such precedents were not addressed by the Court of Criminal Appeals of Texas on direct appeal or in the habeas corpus action. *Tarkington v. Brunett,* 51 S.W. 274 (1899); *Hesbrook v. State,* 194 S.W.2d 260 (1946); *Eason v. State,* 320 S.W.2d 11 (1959); Title 42, United States Code, Sections 1981-1995, inclusive.

ARGUMENT

Argument—Discussion of Facts and Authorities I

The issues raised by Petitioner's application for writ of habeas corpus (CA No. 75-H-1945, US DC SD TX, Tr. 9/4/75, unnumbered docket item) were clearly exhausted in efforts transpiring before the filing of the application in the United States District Court. The controlling authorities establish that a habeas corpus petitioner need only exhaust his State remedies on one occasion. *Kemp v. Pate,* 359 F.2d 749 (1966); *Pryor v. Beto,* 460 F.2d 307 (5th Cir. 1972). Following exhaustion of State remedies, general precedents on the habeas corpus remedy prevail. Title 28, United States Code, Sections 2241, 2242 and 2243; United States Code, Const. Amend. V and XIV; *Bruce v. Beto,* 96 F.2d 212 (1968); *Price v. Johnson,* 334 U.S. 266 (1948), 92 L.Ed. 2d 1356, 68 S.Ct. 1049.

In the second application for writ of habeas corpus (CA No. H-77-1542, US DC SD TX, Tr. Items 5 and 6, 12/19/77), the United States District Court did not determine that State remedies had not been exhausted as it ruled in the earlier proceeding so the briefs in the United States Court of Appeals, Fifth Circuit, No. 78-1870, only addressed this point in certain ancillary discussions.

The indictment in question was returned by a racially discriminatory Grand Jury in the District Court of Polk County, Texas, No. 9432 (No. 47,600, Tr. Item 4, pp. 5-6).

The issue of systematic exclusion of Negroes from the Polk County, Texas, Grand Jury was presented initially under a pre-trial petition for removal in the United States District Court for the Southern District of Texas, Cr. No. 71-H-228, but Petitioner's efforts to establish Grand Jury discrimination by specific interrogatories were stifled (No. 47,600, Tr. Item 6, pp. 14-16 and Item 19, pp. 52-63). Federal Rules Civ. Proc., Rule 33, 28 U.S.C.; Federal Rules Cr. Proc. Rule 15 (d), 28 U.S.C. After remand to the District Court of Polk County, Texas and a transfer of the file to Montgomery County, Texas, an additional motion seeking dismissal and quashing of the cause of action and indictment was filed under docket No. 9432 (No. 47,600, Tr. Item 35, p. 97 and Item 31, p. 89), which was summarily denied without entertaining evidence from Petitioner or taking judicial notice of readily available statistics within the trial Court's custody relevant to Grand Jury discrimination and systematic exclusion. *Norris v. Alabama,* 294 U.S. 587 (1935), 79 L.Ed. 1074, 55 S.Ct. 579; *Alexander v. Louisiana,* 405 U.S. 625 (1972), 31 L.Ed. 2d 536, 92 S.Ct. 1221; *Castaneda v. Partida,* 524 F.2d 481 (1975), aff'd, 430 U.S. 482 (1977), 51 L.Ed. 2d 498, 97 S.Ct. 1272.

The described systematic exclusion of Petitioner's peers as practiced and sanctioned by the courts below denied him the essential elements of a fair trial. Title 42 United States Code, Sections 1981, 1982 and 1983; *Hill v. Texas,* 316 U.S. 400 (1944), 86 L.Ed. 1559, 62 S.Ct. 1159; *Akins v. Texas,* 325 U.S. 398 (1945), 89 L.Ed. 1692, 16 S.Ct. 1276.

The issue of Grand Jury discrimination could not be raised as prescribed by Vernon's Ann. C.C.P., Art. 19.27,

because the District Court of Polk County, Texas did not at the relevant point in time permit Negroes to engage meaningfully and reliably in any stage of the Grand Jury process. However, in addition to Petitioner's pre-trial petitions and motions raising the issue, it was raised through an application for writ of habeas corpus purporting to be in behalf of Petitioner filed by one Attorney Raymond Jordan of 2521 Riverside Drive in Houston, Texas 77004, without advance consultation or discussion with Petitioner regarding the petition (No. 4624, Application for Writ of Habeas Corpus of 1974, Tr. Item 2, pp. 2-8). Vernon's Ann. C.C.P., Art. 11.01-11.64. Much of the described application is inconsistent with fact and Petitioner's contentions. However, each of its paragraphs referring to Grand Jury systematic exclusion of blacks is substantively correct and adopted by Petitioner. *Norris v. Alabama,* 294 U.S. 587 (1935), 79 L.Ed. 1074, 55 S.Ct. 579; *Alexander v. Louisiana,* 405 U.S. 625 (1972), 31 L.Ed. 2d 536, 92 S.Ct. 1221.

Respondent contended in the United States Court of Appeals that Petitioner's allegations of Grand Jury systematic exclusion are conclusory in nature which argument disregards the fact that the original records and best evidence pertinent to Grand Jury activities and preliminaries were in the custody of the State of Texas, and Petitioner's efforts to secure such records were dishonored (No. 47,600, Tr. Item 19, pp. 52-63, Item 35, p. 97, Item 31, p. 90, SF pp. 1-2 of Motion Docket, 5/11/1972.) *Norris v. Alabama,* 294 U.S. 587 (1935), 79 L.Ed. 2d 1074, 55 S.Ct. 579; Federal Rules Civ. Proc., Rule 33, 28 U.S.C.; Federal Rules Cr. Proc., Rule 15 (d), 28 U.S.C.

In the Application for Writ of Habeas Corpus, No. 4624, in the Court of Criminal Appeals of Texas filed in

behalf of Petitioner by Attorney Raymond Jordan of Houston, Texas, without advance consultation with Petitioner, statistics were set forth establishing presumptive Grand Jury discrimination, even though such allegations were subservient to the evidence held by the State of Texas, but a plenary hearing on the application was never granted (No. 4624, Application for Writ of Habeas Corpus, Tr. Item 2, pp. 2-8). *Alexander v. Louisiana,* 405 U.S. 625 (1972), 31 L.Ed. 2d 536, 92 S.Ct. 1221.

The United States District Court had, as a part of its record, the complete State court records on direct appeal as well as the State habeas corpus proceedings reflecting how each issue was raised and developed in the State courts in conjunction with the Federal habeas corpus action (CA No. H-77-1542, US DC SD TX, Tr. Item 1, 9/19/77, pp. 1-5). 29 Am. Jur. 2d, 57 and 59; *Lowe v. McDonald,* 221 F.2d 228 (1955); Fed. Rules Evid., Rule 201(d) and (f), 28 U.S.C.

The refusal of the trial courts to entertain evidence on the issue of Grand Jury systematic exclusion or to provide statistics within its custody on the issue presented a rational basis for presuming Grand Jury discrimination in the locality. This presumption was furthered by the post-conviction application for writ of habeas corpus filed by Attorney Raymond Jordan presenting statistical allegations showing that Negroes comprise 28.2% of the population in Polk County, Texas, but only token participation has been permitted Negroes in Grand Jury activities (No. 4624, Application for Writ of Habeas Corpus of 1974, Tr. Item 2, p. 3, Paragraph VI; see also No. 72-3127, U.S.C.A. 5th Cir., Brief for Appellant, Exhibit "B", Affidavit of Facts, pp. 30-32, and No. 74-5595, U.S. Supreme Court, Petitioner's Exhibits of Affidavits of Facts). *Eubanks v. Louisiana,* 356 U.S. 584 (1958), 2 L.Ed. 2d 991, 78 S.Ct. 970; *Castaneda v. Partida,* 524 F.2d 481 (1975), aff'd, 430 U.S. 482 (1977), L.Ed. 2d , S.Ct.

The described application for writ of habeas corpus finally succeeded in priming a response from the State of Texas in the form of Grand Jury statistics relevant to the subject indictment. Such data reflected that the only Negro slated for duty on the Grand Jury which returned the indictment in question was deprived of his appearance by the conduct of judicial officials in forwarding his notice to an erroneous address (No. 4624, State's Motion Controverting Defendant's Second Application for Writ of Habeas Corpus, Tr. Item 4, p. 42).

The Grand Jury statistics referred to above further reflected the following in summary, with respect to Polk County, Texas:

The Grand Jury list for the July Term, 1970, which returned the subject indictment, listed twenty (20) jurors including one (1) Negro, Langston C. Johnson, and he was not notified of the proceeding.

The Grand Jury list for the January Term, 1970, which immediately preceded the term which returned Petitioner's indictment, reflected twenty (20) jurors including one (1) Negro, Art Cluff of Corrigan, Texas, whose practical participation appears to have been circumvented through coercion.

The Grand Jury list for the July Term, 1969, included twenty (20) jurors and reflected the name of one (1) Negro, Glover Banks of Leggett, Texas, among its composition without any indication of his service.

The Grand Jury list for the January Term, 1969, reflects twenty (20) jurors, but no Negroes are even included on the list.

The Grand Jury list for the January Term, 1968, is composed of twenty (20) jurors including one (1) Negro, Marcus Parker of Leggett, Texas, who was properly notified, apparently, and a second Negro, Jack White of Blanchard community, Livingston, Texas, who was not properly listed for notification.

The Grand Jury list for the July Term, 1967, lists one (1) Negro as a repeat in retrospect, Glover Banks of Leggett, Texas, among its constituency of twenty (20) prospective jurors.

The Grand Jury list for the November Term, 1966, reflects the names of two (2) Negroes, Cornell Turner of Corrigan, Texas and Howard Daniels of Livingston, Texas, among its composition of twenty (20), neither of whom was properly notified to enable their services.

The Grand Jury list for the May Term, 1966, includes the name of one (1) Negro who is a repeat in retrospect, Jack White of Livingston, Texas, among its constituency of twenty (20). It is noteworthy that on this prior instance, his name appears with a proper address suggesting an ulterior motive in failing to provide his proper address on the subsequent listing for the November Term, 1966.

Under standards of long-standing precedent a *prima facie* case of Grand Jury discrimination was established by the described statistics, reflecting ratio of Negroes called for Grand Jury service in comparison with whites of three (3) to seventy-two (72), or one (1) to twenty-four (24), out of a population ratio of Negroes to whites in the County

of three (3) to ten (10) over a contiguous period of five (5) years and seven (7) Grand Jury terms immediately preceding and including the Grand Jury which returned the indictment contested by this litigation (No. 4624, State's Motion Controverting Defendant's Second Application for Writ of Habeas Corpus, Tr. Item 4, pp. 46-53). *Hill v. Texas,* 316 U.S. 400 (1944), 86 L.Ed. 1559, 62 S.Ct. 1159; *Akins v. Texas,* 325 U.S. 398 (1945), 89 L.Ed. 1692, 16 S.Ct. 1276; *Castaneda v. Partida,* 524 F.2d 481 (1975), aff'd, 430 U.S. 482 (1977), L.Ed. 2d , S.Ct. .

Under the original circumstances, Petitioner's allegations could not be exhaustively detailed, but they merited a plenary hearing which would have effected habeas corpus relief, *juris et de jure. Pryor v. Beto,* 460 F.2d 307 (5th Cir. 1972); *Haines v. Kerner,* 405 U.S. 948 (1972), 30 L.Ed. 2d 819, 92 S.Ct. 963.

Argument—Discussion of Facts and Authorities II

The vagueness of the legislation applied to Petitioner is the basic error of the case. Vernon's Ann. P.C., Art. 1410 and 1413; *Bouie v. City of Columbia,* 378 U.S. 347 (1964), 12 L.Ed. 2d 894, 84 S.Ct. 1697; *Douglas v. Buder,* 412 U.S. 430 (1973), 37 L.Ed. 2d 52, 93 S.Ct. 2199. The evidence, as well as the opinion of the Court of Criminal Appeals of Texas on its face, discloses that Petitioner made no false pretext or fraudulent representation to Seller, the complaining witness, or anyone communicating with such Seller. Nor did Seller rely to its detriment on any representation made by Petitioner as the tender of a draft did not purport to be an assignment of any funds or distinct obli-

gations outside the contents and effects of the instrument. V.T.C.A., Bus. & C., §§3.409 and 3.417. This point was reflected by the complaining witness' own testimony under oath before the trial Court and jury that he made multiple independent examinations and evaluations of the pertinent check without relying on any representation of Petitioner (No. 47,600, SF pp. 42 and 51-52). *Anderson v. O'Bryant,* 3 S.W. 2d 842 (1928).

Due process requires that a criminal statute give fair warning of the conduct it prohibits, and the highest court of a State cannot circumvent the legislature and achieve such a result by judicial construction. *Hesbrook v. State,* 194 S.W.2d 260 (1946); *Beard v. State,* 287 S.W.2d 667 (1956); V.T.C.A., Bus. & C., §§3.409, 3.417, 4.303 and 4.403; Title 42, United States Code, Sections 1981, 1982 and 1983; *Bouie v. City of Columbia,* 378 U.S. 347 (1964), 12 L.Ed. 2d 894, 84 S.Ct. 1697. "A law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process." *Baggett v. Bullitt,* 377 U.S. 360 (1964), 12 L.Ed. 2d 377, 84 S.Ct. 131.

Scientifically documented authorities and precedents condone the line of reasoning adopted by Petitioner. (See Bierman, Fouraker and Jaedieke, *Quantitative Analysis for Business Decisions,* Richard Irwin, Inc., Homewood, Illinois (1961), pp. 2, 10, 12, 20, 45-46, 57, 164 and 167). *Brown v. Board of Education of Topeka, Kansas,* 347 U.S. 483 (1954), 98 L.Ed. 873, 74 S.Ct. 686. And it would have been totally unsound for Petitioner to adopt the standard of conduct suggested by the Texas judiciary (see *Executive Order No. 10925,* March

6, 1961). V.T.C.A., Bus. & Co., §§3.417 and 4.403; *Malphus v. Home Savings Bank of City of Albany,* 254 N.Y.S.2d 980 (1965); *Younger v. Harris,* 401 U.S. 37 (1971), 27 L.Ed. 2d 669, 91 S.Ct. 746.

All actions taken by and in behalf of Petitioner resulting in the refusal to pay the pertinent check tendered to Helton-Hodges Motor Company, the complaining witness and Seller, on April 6, 1970, were pursuant to and prescribed by historical precedents. Vernon's Ann. C.C.P., Art. 5.01; Vernon's Ann. Civ. St., Art. 275, 342-712, 4076 and 6840; V.T.C.A., Bus. & Co., §§3.409, 3.417, 4.303 and 4.403; Title 28, United States Code, Sections 1443 and 1447 (d); Title 42, United States Code, Sections 1981-1995, inclusive.

Petitioner's proposition that Seller cooperate in reobtaining Petitioner's Ford vehicle dispossessed in reliance on the sufficiency of the Chevrolet vehicle from Seller was not improper. Petitioner had a right to hold the vehicle during negotiations with Seller and deliberations with a third party who held the Ford vehicle. The remedy was made additionally appropriate following the malicious act of Seller, through its agent Leonard Hodges, in filing the theft charge against Petitioner. V.T.C.A., Bus. & Co., §§2.601, 2.606, 2.608 and 2.721; Vernon's Ann. P.C., Art. 1410 and 1413; Title 28, United States Code, Sections 1343 and 1443; Title 42, United States Code, Sections 1981-1995, inclusive. The primary objective in the abolition of involuntary servitude was to abolish all practices where by subjection some incidents of slavery were legally enforced, either directly, indirectly or insidiously. *United States v. Shackney,* 333 F.2d 475 (1964). Similarly, the prohibition against cruel and

unusual punishment is a positive limitation on legislative and judicial action, and habeas corpus is the popular remedy for accomplishing the constitutional goal. United States Code, Const. Amend. VIII and XIII; Title 28, United S tes Code, Sections 2241, 2242 and 2243; *Dearman v. Woodson,* 429 F.2d 1288 (1970); *Ralph v. Warden, Maryland Penitentiary,* 438 F.2d 786 (1971).

A charge or special instruction to the jury defining the applicability of the *Uniform Commercial Code* or the *Texas Business and Commerce Code* to the transaction, as well as the significance of a solvent account as contrasted with a fictitious account would have diluted the magnitude of the unconstitutional application of the Texas theft statutes, but this procedure was declined by the trial Court (No. 47,600 Tr. Items 57 and 58, pp. 136-138). (Note: Details of the motions and discussions as well as exceptions to the jury charge were alleviated from the record. However, an excerpt is included as footnote "1" in the opinion of the Court of Criminal Appeals of Texas, *Ratcliff v. Texas,* 504 S.W.2d 883 (1974)). Vernon's Ann. P.C., Art. 37.09 and 37.10; Title 42, United States Code, Sections 1981-1995, inclusive; *Bouie v. City of Columbia,* 378 U.S. 347 (1964), 12 L.Ed. 2d 894, 84 S.Ct. 1697; *Douglas v. Buder,* 412 U.S. 430 (1973), 37 L.Ed. 2d 52, 93 S.Ct. 2199.

Argument—Discussion of Facts and Authorities III

The evidence presented in the trial Court showed that on April 6, 1970, Petitioner obtained from Helton-Hodges Motor Company in Livingston, Texas, Seller, a

1966 Chevrolet pick-up truck tendering a check as the consideration (No. 47,600, SF pp. 98-104 and 187). The vehicle proved substantially defective following delivery to Petitioner without the opportunity for prior inspection, and Petitioner refused to permit the check to be paid in due course. V.T.C.A., Bus. & C., §§2.601, 2.-606, 2.608, 2.721 and 4.403.

Notwithstanding Seller's refrain from testifying that the subject vehicle was in good condition (No. 47,-600, SF pp. 113-115) and Petitioner's presenting of tax records reflecting multiple repair charges to show the defective condition of the vehicle (No. 47,600, SF pp. 90-91), the trial Court refused to permit such records into evidence to raise the issue of failure of consideration and an intent to engage in a lawful transaction on the part of Petitioner (No. 47,600, SF pp. 176-186). V.T.C.A., Bus. & C., §§2.601 (a) and 4.403. To the contrary, even though the Statement of Facts as transcribed by Official Court Reporter, Mary Frances Dameron, does not contain the interjections and miscellaneous developments, an aura of impropriety was created by the prosecution and sanctioned by the Presiding Judge with respect to the offering of the described evidence by Petitioner. Vernon's Ann. P.C., Art. 37.09 and 37.10; Title 42, United States Code, Sections 1981, 1982 and 1983; United States Code, Const. Amend. V, VIII and XIV.

The State court records show without controversion that Seller, Helton-Hodges Motor Company, and its agent, Leonard Hodges, made an independent examination of the relevant check, and it made no reliance to its detriment on any representation by Petitioner (No. 47,600, SF p. 42 and pp. 51-52). *Anderson v. O'Bryant,* 3 S.W.2d

842 (1928); *Beard v. State,* 287 S.W.2d 667 (1956); *Eason v. State,* 320 S.W.2d 11 (1959). This issue was supplemented and further developed by evidence in fact admitted of Petitioner's bank statements from the Chase Manhattan Bank, N. A., One Chase Manhattan Plaza, New York, N.Y. 10015, as they established without controversion the solvency of the subject account (No. 47,-600, SF pp. 91-99). V.T.C.A., Bus. & C., §§3.409 and 3.417; Vernon's Ann. Civ. St., Art. 3713, Rules 5 and 6; *Bledsoe v. Yarborough,* 412 S.W.2d 222 (1967); *Hamilton v. Newburg,* 412 S.W.2d 801 (1967); *Modine Manufacturing Co. v. Northeast Independent School District,* 503 S.W.2d 833 (1974); United States Code, Const. Amend. V, VIII, XIII, XIV and XV.

Argument—Discussion of Facts and Authorities IV

The trial Court abused its constitutional discretion exceeding fundamental fairness standards in permitting the jury to consider an unrelated and improper transaction, fully distinguished from the immediate transaction, wherein Petitioner exercised rights of a prayer on a negotiable instrument (No. 47,600, SF pp. 121, 123 and 128). *Tarkington v. Brunett,* 51 S.W. 274 (1899); Vernon's Ann. Rules Civ. Proc., Rule 185; V.T.C.A., Bus. & C., §4.403; United States Code, Const. Amend. V, VIII, XIII, XIV and XV.

The unrelated transaction involved a check payable to Angelina Chevrolet-Cadillac Company admitted into evidence over the timely objection of Petitioner (No. 47,-

600, SF pp. 123 and 127-128). Vernon's Ann. Civ. St., Art. 3713, Rules 5 and 6; *Bledsoe v. Yarborough,* 412 S.W.2d 222 (1967); *Hamilton v. Newburg,* 412 S.W. 2d 801 (1967). Such auto company was indebted to Petitioner through an agency relationship for an off-set in an amount exceeding substantially the amount of the draft admitted into evidence (No. 47,600, SF pp. 119-1310) and such procedures of the State trial Court circumvented Petitioner's conventional rights under negotiable instruments law. Vernon's Ann. Rules Civ. Proc., Rule 185; Vernon's Ann. Bus. & C., §§3.409, 3.417, 4.-303 and 4.403; *Baggett v. Bullitt,* 377 U.S. 360 (1964), 12 L.Ed. 2d 377, 84 S.Ct. 131. Similarly, the ruling coupled with the refusal to instruct or charge the jury specifically on the issues under the *Texas Business and Commerce Code,* or the *Uniform Commercial Code,* evades Petitioner's statutory right to exercise self-help in preventing an inherently criminal act against him. Vernon's Ann. Bus. & C., §§4.303 and 4.403; Title 42, United States Code, §§1981, 1982 and 1983; *Bouie v. City of Columbia,* 378 U.S. 347 (1964), 12 L.Ed 2d 894, 84 S.Ct. 1697.

Argument—Discussion of Facts and Authorities V

The exemplar of the trial judiciary of the State of Texas, along with its prosecutors, was a global effort calculated to deprive Petitioner of due process and his rights as an American citizen (No. 47,600, Tr. Items 62 and 63, pp. 152-161). United States Code, Const. Amend. V, VIII, XIII, XIV and XV. The irregularities may be ap-

preciated graphically by following an event to event observation of prejudicial errors some of which are not assigned to isolated arguments in this petition.

While the proceeding was in the District Court of Polk County, Texas, the judiciary exemplified contempt for Petitioner in a hearing at Montgomery County, Texas by summarily denying his motion seeking to set aside the indictment, and such was done without granting an evidentiary hearing (No. 47,600, Tr. Items 35 and 31, pp. 97 and 89, out of logical order in transcript, SF pp. 1-2, of Motion Docket, 5/11/1972). This obviously prevented a plenary reflection and detailed disposition of Petitioner's objection to the pertinent Grand Jury composition. *Castaneda v. Partida,* 524 F.2d 481 (1975), aff'd, 430 U.S. 482 (1977), L.Ed 2d , S.Ct. .

The second notorious irregularity was the refusal of the trial Court to sequester the petit jury. Vernon's Ann. C.C.P., Art. 35.23; *Burris v. State,* 40 S.W. 284 (1898). The injury attached to jurors being subjected to unlimited contacts and potential influences is too obvious to belabor, and duplicitous discussion of the inflammatory factors is not merited.

Another impropriety diminishing the integrity of the State trial Court was the inability of the Seller to identify the vehicle allegedly taken through theft in light of Petitioner's motion for judgment after the prosecution had rested (No. 47,600, SF p. 38 and pp. 66-69). *Hall v. State,* 219 S.W.2d 475 (1949); *May v. State,* 34 S.W.2d 594 (1930). It is, also, unconscionable that the trial Court would deny Petitioner's motion for judgment while Seller had admitted in sworn testimony before the Court and jury

that he made multiple independent examinations and evaluations of the subject draft without relying on any representation by Petitioner (No. 47,600, SF p. 42 and pp. 51-52 and pp. 66-69). *Anderson v. O'Bryant,* 3 S.W.2d 842 (1928); Title 42, United States Code, Section 1981.

The irregularities were not limited to judicial acts. Official Court Reporter Mary Frances Dameron, also, contributed to the mockery of justice. *Muncy v. Johnston,* 402 S.W.2d 525 (1966). This initially consisted of failure to note Petitioner's exception to the ruling of the trial Court admitting testimony elicited through leading questions of law from the Seller that title to the vehicle in question had left him (No. 47,600, SF p. 55). Vernon's Ann. P.C., Art. 37.09 and 37.10; *Capitol Hotel Company v. Rittenberry,* 41 S.W.2d 697 (1931); *Paxton v. Spencer,* 503 S.W.2d 637 (1973).

The next violation of legal standards under due process requirements involved the trial Court's denial of Petitioner's motion to question a witness, Gilbert Woods of Goodrich, Texas, as an adverse witness (No. 47,600, SF p. 73). This witness had been employed by Seller for several years including the date of the subject transaction, and the trepidation attached to the witness by virtue of the employer-employee relationship merited granting of Petitioner's motion to examine him as an adverse witness. *Webb v. State,* 7 S.W.2d 562 (1928).

Again at page 123 of the Statement of Facts from the Court of Criminal Appeals of Texas, No. 47,600, the unjust character of the proceedings was manifest in the continuation of hearsay evidence before the jury which, though nominally disapproved by the trial Court, prejudiced Pe-

titioner's case more than a mild instruction to disregard could rectify. *O'Beirne v. State,* 365 S.W.2d 787 (1963).

Still further procedurally unfair was the refusal of the trial Court to require witness B. A. Hunter to answer before the jury, "Did you get an insurance company to pay you on insurance that was obtained by Elijah W. Ratcliff?" This testimony, truthfully recited, would have approached proper depiction of Petitioner's position that the witness had a fraudulent, profit-making, overriding objective, for impeachment purposes (No. 47,600, SF p. 129). Lon L. Fuller, *Basic Contract Law,* West Publishing Co., St. Paul, Minn. (1947), p. 285; Vernon's Ann. C.C.P., Art. 38.01-38.03; *Shivers v. State,* 374 S.W.2d 672 (1964); *Hanover Insurance Co. v. Johnson,* 397 S.W. 2d 904 (1965), ref., n.r.e.; *City of Longview v. Boucher,* 274 S.W.2d 274 (1975), ref., n.r.e.

Petitioner sought again to protect the jury from unlimited outside influences at the conclusion of the presentation of evidence, but the trial Court denied the request to sequester (No. 47,600, SF p. 132). Vernon's Ann. C.C.P., Art. 35.23.

The most damaging irregularity, ultimately, of the multitude probably is one where Official Court Reporter Mary Frances Dameron failed to include the full discussions surrounding the submission of the charge to the jury as a part of the appellate record. Her transcription deletes all description of the trial Court's refusal to honor the discussions on the jury charge in open court as well as in chambers even though it does show via the transcript certain proposed charges and instructions to the jury from Petitioner which would have presented the law applicable to the case in a less vague context (No. 47,600, Tr.

Items 57 and 58, pp. 136-144, SF pp. 131-132). Vernon's Ann. P.C., Art. 37.09 and 37.10; Vernon's Ann. C.C.P., Art. 36.14 and 36.15; *Parker v. Keyser,* 540 S.W.2d 827 (1976); *Baggett v. Bullitt,* 377 U.S. 360 (1964), 12 L.Ed. 2d 377, 84 S.Ct. 1316.

During the arguments to the jury, the most prejudicial irregularities consisted of repetitious interruptions by the prosecutors, apparently to curry favor with the jury, where not a semblance of an objection was proper (No. 47,600, SF p. 151); the extension of the prosecutors' argument to contexts unrelated to and inconsistent with statements and testimony during the presentation of evidence (No. 47,600, SF pp. 154-157); and the comparable extension of the prosecutors' argument to speculation on law (No. 47,600, SF pp. 160-161) even though similar argument was denied Petitioner in spite of the objective of Petitioner's argument being to rectify a deficiency inherent in the jury charge (No. 47,600, SF p. 152). 56 Tex. Jur. 2d, Trial §240; V.T.C.A., Bus. & C., §§3.409, 3.417, 4.303 and 4.403; *Fultz v. First National Bank,* 380 S.W.2d 894 (1964).

A further noteworthy irregularity by the Official Court Reporter at this stage consisted of striking the prefix "in" from "inconsistent" to evade Petitioner's objection to arguments by the prosecutors which were inconsistent with the evidence received during the presentation of cases (No. 47,600, SF pp. 154-157). United States Code, Const. Amends. V, VIII, XIII, XIV and XV; Vernon's Ann. P.C., Art. 37.09 and 37.10; *Jordan v. Massachusetts,* 225 U.S. 167 (1912); 56 L.Ed. 1038, 32 S.Ct. 651; *Johnson v. Mississippi,* 403 U.S. 212 (1971), 29 L.Ed. 2d 423, 91 S.Ct. 1778.

CONCLUSION

Petitioner's conviction in the District Court of Montgomery County, Texas, No. 11,064, should be voided; his illegal restraint upon liberty personally incurred terminated; and his rights as a citizen declared. Vernon's Ann. C.C.P., Art. 11.01-11.64, inclusive; Title 42, United States Code, Sections 1981, 1982 and 1983; *Miller v. Winn,* 28 S.W.2d 578 (1930); *Pryor v. Beto,* 460 F.2d 307 (1972); *Fay v. Noia,* 372 U.S. 391 (1963), 9 L.Ed. 2d 837, 83 S.Ct. 822; *Cox v. Louisiana,* 379 U.S. 536 (1965), 73 L.Ed. 2d 471, 85 S.Ct. 453.

The mandate of the Supreme Court of the United State should order the United States Court of Appeals, Fifth Circuit, to direct the United States District Court for the Southern District of Texas, Houston Division, to grant the writ of habeas corpus and enter judgment voiding the State trial Court conviction of Petitioner herein. Title 28, United States Code, Sections 1651, 1652, 2241, 2242 and 2243; United States Code, Const. Amends. V, VIII, XIII, XIV and XV.

Even though more than six (6) years elapsed from the date of the subject State trial Court judgment of conviction, suspension and disbarment orders were recently entered by the Supreme Court of the United States with respect to Petitioner as a member of the Bar of this Court, No. D-159, In the Matter of the Disbarment of Elijah W. Ratcliff U.S. (1979), 59 L.Ed. 2d 450, 99 S.Ct. 1206; and U.S. (1979), L.Ed. 2d , 99 S.Ct. 2025. The order of the Court under the immediate docket should judicially note and nullify the earlier orders

and reinstate Petitioner's good standing as an attorney with the Bar of this Court. Fed. Rules Evid., Rule 201, 28 U.S.C.

July 23, 1979

Date

ELIJAH W. RATCLIFF,
Petitioner, Pro Se
P.O. Box 862
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APPENDIX A

Elijah W. Ratcliff,
Petitioner-Appellant,

v.

W. J. Estelle, Jr., Director, Texas Department of Corrections,
Respondent-Appellee.

No. 78-1870

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

June 20, 1979

Appeal from the United States District Court for the Southern District of Texas.

Before Thornberry, Clark and Roney, Circuit Judges.

Roney, *Circuit Judge*:

[1] If a state court finds that a procedural default forecloses a convicted defendant's right to challenge collaterally the composition of the grand jury which indicted him, but then proceeds to consider and deny the challenge on the merits, must a federal court deny habeas corpus

relief under the contemporaneous objection rule, without reaching the merits of the constitutional attack? We agree with the district court that it must.

On appeal from a dismissal of a petition for habeas corpus relief, petitioner Ratcliff contends that blacks were systematically excluded from the grand jury whose indictment lead to his Texas theft conviction. Petitioner did not raise the issue of grand jury composition in the Texas courts until his second petition for habeas corpus almost two years after his trial and three-and-a-half years after the indictment was presented. Applying the statutory rule providing for procedural default for failure to make a timely objection to the composition of a grand jury, the Texas court dismissed his challenge. It then went on to find no merit to the grand jury challenge.

Had the Texas court grounded its decision solely on the procedural waiver, the law is clear that the federal court could not reach the merits. It appears, without question, that the state court properly applied the Texas procedural rule.

[2, 3] The Texas courts have construed Tex. Code Crim. Proc. Ann. art. 19.27 (Vernon)[1] to mean that a defendant must raise a challenge to the composition of the grand jury at the earliest point possible. *Valadez v. State,* 408 S.W.2d 109 (Tex. Cr. App. 1966). Where there has

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[1] Tex. Code Crim. Proc. Ann. art. 19.27 (Vernon) provides:

Before the grand jury has been impaneled, any person may challenge the array of jurors or any person presented as a grand juror. In no other way shall objections to the qualifications and legality of the grand jury be heard. Any person confined in jail in the county shall upon his request be brought into court to make such challenge.

been no neglect, a challenge to the composition of the grand jury can be raised before trial by a motion to quash the indictment. *See, e.g., Carter v. Texas,* 177 U.S. 442, 20 S.Ct. 687, 44 L.Ed. 839 (1900); *Dumont v. Estelle,* 513 F.2d 793, 976 (5th Cir. 1975); *Ex parte Covin,* 161 Tex. Cr. R. 320, 277 S.W.2d 109 (1955). Since petitioner waited almost two years after trial to raise the issue of grand jury composition, this procedural rule applied and petitioner does not suggest that there was any impropriety in its application.

[4] Recent Supreme Court cases have indicated that, absent a showing of cause and prejudice, federal courts must respect a procedural rule such as that employed here by Texas. *Davis v. United States,* 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed. 2d 216 (1973) (challenge to grand jury make-up under 28 U.S.C.A. §2255 rejected under federal contemporaneous objection rule, Fed. R. Crim. P. 12(b)(2)); *Francis v. Henderson,* 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed. 2d 149 (1976) (*Davis* rule applied to state contemporaneous objection rule in a habeas corpus petition, 28 U.S.C.A. §2254). *See also Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed. 2d 594 (1977).

[5] Petitioner has failed to show cause for his failure to make a timely objection. Petitioner has suggested that federal pleadings filed in connection with a removal petition under 28 U.S.C.A. §§1442 and 1443 served informally upon remand to the state court to raise the issue of jury composition. These federal pleadings were a motion to quash the indictment based on the allegation that the grand jury was racially prejudiced, and interrogatories attempting to ascertain the racial make-up of the grand

jury. There were served upon the State and were available to the state court. The state court did not rule upon them, however, and petitioner has not shown that in any manner he requested the state court to consider them or sought to raise the issues in separate state pleadings. Absent some indication that the state court considered the federal pleadings or was asked to do so, such pleadings cannot be said informally to satisfy a state contemporaneous objection rule.

[6] At oral argument petitioner indicated that as an attorney he was aware of the disproportionate racial make-up of the grand jury but lacked facts and figures to substantiate his position. He did not file interrogatories in the state court to obtain this information. He indicated that it was his impression that an objection to the Texas trial court would have been futile. The fact that an objection may be overruled does not, however, constitute the requisite cause which would excuse a procedural default under the rule of *Davis* and *Francis* and their progeny. *See Buckelew v. United States,* 575 F.2d 515, 519-520 (5th Cir. 1978); *Evans v. Maggio,* 557 F.2d 430 (5th Cir. 1977); *Wright v. Wainwright,* 537 F.2d 224, 226 (5th Cir. 1976). Since Ratcliff has not shown cause, we need not inquire whether prejudice existed since both are required. *Lumpkin v. Ricketts,* 551 F.2d 680, 681-682 (5th Cir.), *cert. denied,* 434 U.S. 957, 98 S.Ct. 485, 54 L.Ed. 2d 316 (1977). In any event, Ratcliff did not allege any specific prejudice.

Consequently, the district court was correct in concluding that the state court had properly applied Texas procedural law in holding that Ratcliff waived his right to challenge the composition of the grand jury.

[7] The difficult part of this case arises because the state habeas corpus court in its opinion proceeded to discuss the merits of the constitutional challenge after ruling that there was a procedural default. Ratcliff contends that this discussion of the merits brings the case within the rule that prohibits a federal court from applying a state timely objection rule where the state court itself has not done so. *Newman v. Henderson,* 425 U.S. 967, 96 S.Ct. 2162, 48 L.Ed. 2d 791 (1976); *Francis v. Henderson,* 425 U.S. 536, 542 n. 5, 96 S.Ct. 1708, 48 L.Ed. 2d 149 (1976); *Lefkowitz v. Newsome,* 420 U.S. 283, 292 n. 9, 95 S.Ct. 886, 43 L.Ed. 2d 196 (1975); *Fay v. Noia,* 372 U.S. 391, 435, 83 S.Ct. 822, 9 L.Ed. 2d 837 (1963); *Irvin v. Dowd,* 359 U.S. 394, 79 S.Ct. 825, 3 L.Ed. 2d 900 (1959); *Bromley v. Crisp,* 561 F.2d 1351, 1359-1360 (10th Cir. 1977), *cert. denied,* 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed. 2d 499 (1978); *Newman v. Henderson,* 539 F.2d 502, 503-504 (5th Cir. 1976), *cert. denied,* 433 U.S. 914, 97 S.Ct. 2986, 53 L.Ed. 2d 1100 (1977); *Partida v. Castaneda,* 524 F.2d 481, 483 (5th Cir. 1975).

Proper resolution of such a case turns on careful attention to the basis of the state court decision. Two consolidated habeas corpus cases from this Court challenging the composition of grand juries illustrate this point. *Newman v. Henderson,* 496 F.2d 896 (5th Cir. 1974). In the case of the first petitioner, Newman, the state court had denied relief on the merits of petitioner's claim. The federal district court held that there was grand jury discrimination but its grant of habeas corpus was vacated by this Court which detected a failure to object in a timely manner under state law, even though the state court had not so held. The Supreme Court vacated our judgment,

noting that the federal court could not apply a state waiver rule that the state court had declined to impose. *Newman v. Henderson,* 425 U.S. 967, 96 S.Ct. 2162, 48 L.Ed. 2d 791 (1976). In the case of the second petitioner, Francis, the state court had based its decision on petitioner's failure to file objections within the period specified by state law, and did not reach the merits of the grand jury challenge. We held that under *Davis v. United States,* 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed. 2d 216 (1973), a federal court cannot reach the merits of a grand jury challenge in the face of a state procedural default, absent a showing of cause or prejudice. The Supreme Court affirmed. *Francis v. Henderson,* 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed. 2d 149 (1976). In each case, the basis of the state court's decision was decisive in determining whether the federal court could reach the merits.

Other cases demonstrate the same point. In *Lefkowitz v. Newsome,* 420 U.S. 283, 95 S.Ct. 886, 43 L.Ed. 2d 196 (1975), the Supreme Court held that where a guilty plea did not bar state appellate review, a habeas corpus petitioner was not prevented from litigating a constitutional issue in federal court. In *Irvin v. Dowd,* 359 U.S. 394, 79 S.Ct. 825, 3 L.Ed. 2d 900 (1958), the decision that the federal court could rule on the federal claim turned on the Court's conclusion that the state supreme court decision rested on the merits of the constitutional claim rather than on a procedural point.

Thus the rule is that if "the state courts entertained the federal claims on the merits, a federal habeas corpus court must also determine the merits of the applicant's claim." *Lefkowitz v. Newsome, supra,* 420 U.S. at 292 n. 9, 95 S.Ct. at 891.

In the instant case, there is no doubt that the procedural default rule was applied in state court. The state trial court squarely held that petitioner had failed to make a timely objection to the grand jury array. It then went on to discuss the merits, apparently with a view to disposing of all issues in the event it was in error on the procedural point. Without written order the Texas Court of Criminal Appeals denied petitioner's application based on the findings of the trial court.

[8] It is fair to assume that the appellate court applied the procedural default rule. First, the language in the trial court opinion regarding procedural default is absolute and there is no subsequent language which would qualify or compromise it. Second it is well settled that a court will not reach a constitutional question if it can rest its decision on nonconstitutional grounds. *See Rescue Army v. Municipal Court,* 331 U.S. 549, 67 S.Ct. 1409, 91 L.Ed. 1666 (1947). *See generally* Nowak, Rotunda & Young, Constitutional Law 83-85 (1978). Third, there is no question that the trial court correctly applied Texas law on the procedural issue.

Having decided here that the state court applied its procedural default rule and did so correctly, the federal courts must abide by that decision, cause for failure to object and actual prejudice not having been shown. The district court's dismissal of the petition for habeas corpus relief on the grand jury issue must, therefore, be affirmed.

Ratcliff raises several additional points which we reject: (1) He alleges that the statutes under which he was convicted are unconstitutionally vague. Aside from this conclusory statement, however, petitioner does not in any

way demonstrate their vagueness. (2) He argues that the trial court erred in two evidentiary rulings. In one, the court refused to admit Ratcliff's income tax records into evidence. In the other, the court admitted evidence of an extraneous transaction offered for the limited purpose of showing intent. *See Hafti v. State,* 416 S.W.2d 824, 825 (Tex. Cr. App. 1967). In neither instance did the trial court's ruling deprive the trial of fundamental fairness. *Heads v. Beto,* 468 F.2d 240 (5th Cir. 1972), *cert. denied,* 410 U.S. 969, 93 S.Ct. 1454, 35 L.Ed. 2d 704 (1973). (3) He contends that the proceedings in the state trial court were calculated to deprive him of due process and to influence the Texas Board of Pardons and Paroles. These allegations are merely conclusory and are unsupported by specific facts.

Affirmed.

[A copy of recited "Memorandum and Order" of January 27, 1977 was never furnished Petitioner related to Final Judgment of June 28, 1977, United States District Court, Southern District of Texas, Houston Division, CA No. 75-H-1945, even though repetitious requests were made to the Clerk of the Court.]

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 75-H-1945

Elijah W. Ratcliff,

Petitioner,

v.

W. J. Estelle, Jr., Director, Texas Department of Corrections, et al.,

Respondents.

Clerk, U. S. District Court
Southern District of Texas

Filed
Jun 28 1977
V. Bailey Thomas, Clerk
By Deputy: [Illegible]

FINAL JUDGMENT

BE IT REMEMBERED that the above entitled and numbered habeas corpus action came on for a determination on Respondent's Amended Motion to Dismiss, and

it appearing to the Court that respondent's motion should be granted for the reasons stated in the Court's Memorandum and Order of January 27, 1977,

NOW, THEREFORE, it is ORDERED, ADJUDGED, and DECREED that Respondent's Amended Motion to Dismiss be, and the same hereby is, GRANTED and the above entitled and numbered action is accordingly hereby DISMISSED without prejudice for failure to exhaust state remedies as to all of the claims raised in his petition.

This is a FINAL JUDGMENT.

The Clerk shall file this Final Judgment and send a copy to the parties.

DONE at Houston, Texas, this 28th day of June, 1977.

(s) James Neal
Judge Presiding

True Copy I Certify
Attest:
V. Bailey Thomas, *Clerk*
By [Illegible]
Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 75-H-1945

Elijah W. Ratcliff,

Petitioner,

vs.

William J. Estelle, Jr.,

Respondent.

Clerk, U. S. District Court
Southern District of Texas

Filed
Aug 19 1977

V. Bailey Thomas, Clerk
By Deputy [Illegible]

ORDER

This action is before the Court on petitioner's motion for certificate of probable cause to appeal, and it appearing to the Court that the appeal is not taken in good faith and the Court finding that the appeal is plainly frivolous, it is

ORDERED that petitioner's motion for certificate of probable cause be, and the same hereby is, DENIED.

The Clerk shall file this Order and send copies to the parties.

DONE at Houston, Texas, this 19 day of August, 1977.

James Neal
Senior United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-77-1542

Elijah W. Ratcliff

Petitioner

vs.

W. J. Estelle, Jr.

Respondent

Clerk, U. S. District Court
Southern District of Texas

Filed
Dec 19 1977

V. Bailey Thomas, Clerk
By Deputy: [Illegible]

MEMORANDUM AND ORDER:

This cause of action is before the Court on the Petitioner's application for writ of habeas corpus. Petitioner, in his present writ application, contends the following:

1. that he was convicted under an unconstitutionally vague statute;

2. that Blacks were systematically excluded from the Grand Jury;

3. that the trial court abused its discretion in refusing to permit Petitioner's tax records into evidence;

4. that the trial court abused its discretion in admitting evidence that Petitioner had stopped payment on a check in another transaction; and

5. that the proceedings in the district court were calculated to deprive Petitioner of due process and that such actions influenced the conduct of the officials of the Texas Board of Pardons and Paroles.

The Court having considered the pleadings and the response thereto is of the opinion that Petitioner's application for writ of habeas corpus should be and the same is hereby dismissed.

First, Petitioner's contention that he was convicted under an unconstitutionally vague statute is without merit. The Fifth Circuit has held that habeas corpus is not a proper means for attacking a statute on the ground of facial unconstitutionality, *Walters v. Clement,* 544 F.2d 1340 (5th Cir. 1977). Thus, in the absence of allegations that the statute as applied to Petitioner was unconstitutional, Petitioner is not entitled to habeas corpus relief.

Secondly, Petitioner's allegation that Blacks were systematically excluded from the Grand Jury is a mere conclusion as he has failed to state any facts supporting this allegation. Petitioner must do more than assert conclusions. *Woodward v. Beto,* 447 F.2d 103 (5th Cir. 1971). Also, Petitioner's failure to object to the makeup of the Grand Jury prior to trial waived any arguable defect in the constitution of such juries. *Francis v. Henderson,* 425

U.S. 536, 96 S.Ct. 1708 (1976). Petitioner, therefore, is not entitled to habeas corpus regarding this allegation.

Third, Respondent contends that Petitioner's contention that the trial court erred in refusing to permit Petitioner's tax records into evidence, even if true, does not raise an issue of constitutional dimension upon which federal habeas corpus relief might be granted.

Petitioner's contention raises a question of the propriety of evidentiary findings. These are matters determined by state courts and are not amenable to federal habeas corpus relief. *Nelson v. Moriarty,* 484 F.2d 1034 (1st Cir. 1973).

The Fifth Circuit, in *Heads v. Beto,* 468 F.2d 241 (5th Cir. 1972), held that questions concerning the admissibility of evidence are not subject to a review by a federal court in a habeas corpus proceeding unless the error is of such a magnitude as to deny fundamental fairness to the criminal trial. Respondent asserts that error, if any, does not rise to the level of a denial of such fundamental fairness.

Fourth, Petitioner's allegation that the trial court erred in admitting evidence of an extraneous transaction does not state a cause of action upon which relief may be granted. Admission of evidence of extraneous offenses in a state trial does not present a federal question upon which habeas corpus relief may be predicated. *Murphy v. Beto,* 416 F.2d 98 (5th Cir. 1969); *Heads v. Beto,* 468 F.2d 241 (5th Cir. 1972).

Respondent would note that the trial judge did not err in admitting the evidence. The State offered the evi-

dence regarding the transaction for the limited purpose of showing intent (see Statement of Facts p. 108) and the jury was clearly advised of this fact in the jury charge. Evidence of such extraneous offense may be admitted into evidence to show the scheme, design, identity, or intent. *Newman v. Texas,* 485 S.W.2d 576 (Tex. Crim. App. 1972); *Nees v. Culbertson,* 406 F.2d 621 (5th Cir. 1969).

Finally, Petitioner's contention that the proceedings in the district court were calculated to deprive Petitioner of due process and that such actions influenced the conduct of the officials of the Texas Board of Pardons and Paroles is conclusory in nature and as such does not entitle Petitioner to federal habeas corpus relief. *Woodward v. Beto,* 447 F.2d 103 (5th Cir. 1971). Generalities are not sufficient. Specific factual allegations are required.

The Clerk shall file this Memorandum and Order and provide all parties with a true copy.

Done at Houston, Texas, this 19th day of December, 1977.

(s) Woodrow Seal
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-77-1542

Elijah W. Ratcliff,

Petitioner

vs.

W. J. Estelle, Jr.,

Respondent

Clerk, U. S. District Court
Southern District of Texas

Filed
Jan 20 1978

V. Bailey Thomas, Clerk
By Deputy: J. McCullough

MEMORANDUM AND ORDER:

This cause of action is before the Court on the Appellant's Application for Certificate of Probable Cause. The Court has considered the Application and hereby ORDERS:

Appellant's Application for Certificate of Probable Cause is DENIED.

The Court is of the opinion that a certificate of probable cause should not issue pursuant to Fed. R. App. P. 22 (b) because this appeal is frivolous.

The Clerk shall file this Memorandum and Order and provide all parties with a true copy.

Done at Houston, Texas, this 20 day of January, 1978.

(s) Woodrow Seal
United States District Judge

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office of the Clerk

Edward W. Wadsworth
Clerk

600 Camp Street
New Orleans, La. 70130
Telephone 504-589-6514

March 27, 1978

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 77-8424—Elijah Ratcliff vs. W. J. Estelle
(Dist. Ct. No. 75-H-1945)
No. 78-8093—Elijah Ratcliff vs. W. J. Estelle
(Dist. Ct. No. 77-1542-CA-H)

The following action has this day been taken in the above case:

* * *

(XXX) Order enclosed has been entered.

cc Mr. Elijah W. Ratcliff (w/personal papers)
Mr. Alvin K. James
Mr. John Pierce Griffin
Mr. V. Bailey Thomas, Clerk

P.S. to Mr. Thomas: Returned herewith are your original papers in *No. 77-1542-CA-H to be certified as the record on appeal.*

Also returned herewith are your original papers in No. 75-H-1945. Please acknowledge receipt.

Edward W. Wadsworth, *Clerk*
By (s) Clare F. Sachs
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 77-8424 & 78-8093

U. S. Court of Appeals

Filed
Mar 27 '78

Edward W. Wadsworth
Clerk

Elijah W. Ratcliff,

Petitioner,

versus

W. J. Estelle, Jr.,

Respondent.

On Application for Certificate of Probable Cause

ORDER:

These cases were consolidated on the unopposed motion of petitioner. The Court has been holding No. 77-8424 pending *en banc* resolution of a case dealing with the exhaustion question there presented. However, because state remedies have now been exhausted and the

same issues are raised in No. 78-8093, petitioner's *pro se* application for certificate of probable cause in No. 77-8424 is DENIED. However, petitioner's *pro se* application for certificate of probable cause in No. 78-8093 is GRANTED.

SO ORDERED.

(s) Homer Thornberry
United States Circuit Judge

OPINION, COURT OF CRIMINAL APPEALS OF TEXAS

Filed
Feb 25 1974
District Clerk
Montgomery County, Texas
By Peggy Stevens, Deputy

No. 47,600

Elijah W. Ratcliff,
Appellant

v.

The State of Texas,
Appellee

Appeal From Montgomery County

OPINION

Appellant was indicted for the offense of felony theft as defined in Art. 1410, V.A.P.C., and the jury found him guilty and fixed his punishment at confinement for six years. The trial was held in Montgomery County after the Court ordered a change of venue from Polk County on its own motion following appellant's application for a change of venue.

On April 6, 1970, appellant appeared at an automobile dealer's place of business in Livingston and there negotiated with one of the partners for the purchase of a 1966 Chevrolet pickup truck. The parties agreed upon a price of $895 plus taxes and transfer charges, the total price being $923.60. Appellant then wrote a check for the full amount of the price of the vehicle payable to the dealer, and received the certificate of title and license receipts for the truck. He then drove away in the truck.

However, before completing the transaction, the dealer had his bookkeeper telephone the bank upon which the check was drawn, Chase Manhattan Bank in New York City, to determine if appellant's check was covered by funds then on deposit in the bank and would be honored on presentation. Upon being assured that funds were on deposit sufficient to cover the check, the dealer completed the transaction.

The seller deposited the check in the bank for collection in accordance with usual banking practices, but it was returned to him by his local bank within a short time thereafter with the notation that payment thereon had been stopped by the maker. The dealer made several unsuccessful attempts to secure the money or the truck from the appellant, but no civil proceedings resulted from the transaction.

Appellant testified that he had never paid the dealer anything for the truck, that he still had it and the certificate of title in his possession. As we read the testimony, he attempted to defend the charges by offering his own testimony that the truck was defective in several respects and was not worth the price agreed upon.

Appellant offered in evidence his copies of the bank records of the New York bank upon which the check was drawn and such records established that he actually had on deposit in said bank, for a substantial period before and after the date of the check, funds sufficient to cover the face of the check which he had given in payment of the truck.

Appellant presents grounds one and three together in his argument and we will consider them jointly. Ground one contends that the evidence is insufficient to sustain the conviction and, by ground three, he contends that the trial court erred in overruling his motion for an instructed verdict.

Neither party cites nor refers us to a case precisely in point upon the question now under review. Appellant's cases refer to theft by false pretext by the giving of a worthless check in payment of merchandise. E.g., Dinsmore v. State, 169 Tex. Crim. 504, 335 S.W.2d 612 (1960). Others relate to the offense of swindling. E.g., Jones v. State, 123 Tex. Crim. 437, 59 S.W.2d 418 (1933). None are found to be apposite.

The State's brief, although elaborate and lengthy, likewise fails to present either case or statutory authority controlling the disposition of the grounds of error now under review.

The indictment charged theft as defined in Art. 1410, V.A.P.C., reading:

> " 'Theft' is the fraudulent taking of corporeal personal property belonging to another from his possession, or from the possession of some person holding the same for him, without his consent, with intent to deprive the owner of the value of the same, and to appropriate it to the use or benefit of the person taking."

The charge, which followed the pattern found in 5 Branch's Ann. P.C. (2d ed. 1956) §2683.1 at 131, submitted theft by false pretext as defined in Art. 1413, V.A.P.C. The latter part of Art. 1413 reads: "[I]f the taking, though originally lawful, was obtained by any false pretext, or with any intent to deprive the owner of the value thereof, and appropriate the property to the use and benefit of the person taking, and the same is so appropriated, the offense of theft is complete."

It is now well-settled that a conviction of theft by false pretext can be had upon an indictment in ordinary form charging felony theft as defined in Art. 1410, V.A.P.C. Anders v. State, 171 Tex. Crim. 344, 350 S.W. 2d 549 (1961), and authorities therein cited. And, as said in 5 Branch's, supra, §2681, p. 127:

> "The offense of theft is complete under this article [1413] when the owner of property capable of being stolen surrenders possession of it to one who had the fraudulent intent to appropriate it and did appropriate it to his own use, and the owner's consent to such fraudulent taking does not prevent the conviction of theft."

It was incumbent upon the State, to sustain a conviction of theft by false pretext, to prove beyond a reasonable doubt that appellant obtained possession of the pick-up truck: (a) through some pretext; (b) that the pretext was false; (c) that there existed an intent on the part of appellant to appropriate the truck at the time he obtained

possession thereof; and (d) he did so appropriate it to his own benefit. Willims v. State, 152 Tex. Crim. 233, 211 S.W.2d 951, 952 (1948). Moreover, the State had the further burden of proving there was a reliance upon the false pretext. Womack v. State, 408 S.W.2d 119, 121 (Tex. Cr. App. 1967). See also Colaluca v. State, 494 S.W.2d 885, 886 (Tex. Cr. App. 1973).

Appellant's argument that the evidence is insufficient to support the conviction is stated in this manner:

> "[T]he issue is whether the defendant promised not to stop payment on the check and such promise was a false one. We submit that no such proof beyond a reasonable doubt was presented in the instant case. There was no proof of any verbal acts on [the] part of the defendant; no proof of a promise. And if an inference is to be made that there was a promise, there is no proof that the promise was false."

Regrettably, appellant refrains from citation of authority supporting the contention so advanced.

The general rule is announced in Dixon v. State, 152 Tex Crim. 504, 215 S.W.2d 181, 182 (1948):

> "Verbal assertions or direct representation are not required to show a false pretense or representation. Such may be shown by the conduct and acts of the party." (Citations omitted.)

Accord: Westover v. State, 167 Tex. Crim. 589, 322 S.W. 2d 279, 280 (1959); Luster v. State, 172 Tex. Crim. 319, 356 S.W.2d 934, 935 (1962); Hogan v. State, 393 S.W. 2d 898, 901 (Tex. Cr. App. 1965).

In his own testimony, appellant admitted obtaining title to and possession of the truck, his issuance of the check in payment therefor, that he requested the drawee bank to stop payment thereon, his refusal to return the truck or to release the stop payment order on the check, his refusal to pay the face of the check in cash, his present possession of the truck, and the fact that he had not paid (in money or other thing of value) anything therefor.

We also note that although appellant testified in detail as to the transaction, at no time did he ever deny his intent to procure title and possession of the vehicle through the issuance of the check and then stopping payment thereon. Giving due consideration to all of the facts enumerated above, we find the evidence sufficient to sustain the conviction and grounds one and three are overruled. Dixon v. State, supra, and authorities following it.

We are strengthened in this conclusion when we take into consideration the fact that appellant had acquired possession of another vehicle from another dealer through the same stratagem, a matter to which we now turn.

Appellant's second ground of error complains of the admission of evidence of a similar crime. Upon cross-examination, appellant was asked:

> "Q. Did you ever buy another vehicle from any other person and stop payment on the check that you gave in payment for it?
>
> "A. No.
>
> "Q. You may not have understood my question. I'll rephrase it. Did you buy a vehicle from

Mr. Hunter in Lufkin and give him a check for the vehicle and then stop payment on that check?

"A. No."

After appellant rested his case the State called R. A. Hunter, an automobile dealer from Lufkin, and established that in April, 1971 (a year after the transaction here involved), he sold a 1972 Vega to appellant, receiving his check drawn upon a Chicago bank in the amount of $500 in part payment therefor. This check was returned shortly after it was deposited with the notation "Payment Stopped"; that he was unable to locate either appellant or the vehicle for a long time thereafter; and, when finally found, the vehicle had been wrecked and that appellant had never paid him therefor.

The State offered this testimony for the limited purpose of showing intent at the time appellant obtained possession of the truck involved in this case. The Court so advised the jury at the time of its admission and covered the matter in detail in the charge.

Appellant's objection to the receipt of the testimony was expressed in this manner: "Objection to that. It's too remote. It's irrelevant. No predicate has been laid to establish the relevancy of it."

Appellant cites only Jones v. State, as authority; but there is no volume listed for the particular "Jones" case which he has in mind and we are not disposed to read the hundreds of Jones cases listed in Volume 40 of the Texas Digest table of cases which bear the same title in an effort to locate the one cited.

Our record discloses that the trial court had before him at the time the testimony was admitted the opinion

in O'Brien v. State, 376 S.W.2d 833, 836 (Tex. Crim. App. 1964). There, quoting from an earlier case, the Court said:

" 'When an extraneous crime, or other transaction, tends to show intent when intent is in issue, proof of same is admissible.' "

In 1 Branch's Ann. P.C. (2d ed 1956) §188, p. 200, many cases are cited supporting the rule stated above. The rule so enunciated is still valid. See, e.g., Blankenship v. State, 448 S.W.2d 476, 480 (Tex. Cr. App. 1969).

Indeed, it appears that the testimony was admissible for still another reason: it controverted the defensive theory of lack of intent which found support only in his own testimony. Cf. Frison v. State, 473 S.W.2d 479, 483 (Tex. Cr. App. 1971). Ground two is overruled.

In his fourth ground of error, appellant contends that the trial court erred in refusing one of his requested charges, reproduced in the margin.[1] The only authority cited is Goldman v. State, 468 S.W.2d 381 (Tex. Cr. App. 1971), enunciating the well-established rule that an accused is entitled to an affirmative instruction on every defensive issue raised by the evidence, even though such issue is raised by his testimony alone. We readily acknowledge the rule so announced, but do not find it to be applicable.

---

[1] "If you find that sufficient funds were in the account of the applicable Bank to pay the amount of the check tendered to Helton-Hodges Motor Company, and that the defective condition of the vehicle delivered to Defendant as consideration justified a request that payment of the check be stopped, then you must find the Defendant not guilty."

The charge found in our record, to which appellant made no objection, is substantially the same charge found in 8 Texas Practice, Criminal Forms (Morrison and Blackwell, 7th ed.) §3559, p. 564. In Dennis v. State, 420 S.W. 2d 940, 942 (Tex. Cr. App. 1967), the Court said:

> "The charge as given in this case is substantially in the same terms as the charge which is recommended in Willson's Criminal Forms, Seventh Edition, Section 3559. Without further authority we would not be inclined to require the giving of additional charges for the jury's guidance."

See also, Colaluca v. State, supra (494 S.W.2d at 887).

Judge Onion, speaking for the Court in Parks v. State, 437 S.W.2d 554, 557 (Tex. Crim. App. 1969), cited two key numbers to Texas Digest, along with two cases supporting this statement.

> "Further, it is well established that special requested charges may be properly refused where the instructions given by the court are adequate and fully protect the rights of the accused."

Moreover, appellant does not refer us to any authority supporting his major premise, that an uncommunicated unilateral subjective determination by an accused as to the value of property received in exchange for a check is a defense to theft by false pretext. We find no error in the refusal of the requested charge and ground four is overruled.

The judgment in the case at bar orders confinement in the state penitentiary for not less than two nor more than six years. This appears to be an improper application of Art. 42.09, V.A.C.C.P., (the indeterminate sentence law) to the judgment rather than the sentence. The judgment will be reformed to comply with the jury's verdict assessing a definite penalty of six years confinement in the Texas Department of Corrections. Bradley v. State, 450 S.W.2d 847, 854 (Tex. Crim. App. 1969).

As reformed, the judgment is affirmed.

Quentin Keith,
Commissioner

(Delivered January 23, 1974)
Opinion approved by the Court

A True Copy
Attest:
Glenn Haynes, Clerk
Court of Criminal Appeals of Texas

By: Tommy [Illegible]
Deputy

Trial Court No. 11,064

Filed
Feb 25 1974
R. J. Gray
District Clerk, Montgomery County, Texas
By Peggy Stevens, Deputy

The State of Texas,

To the 9th Judicial District Court of Montgomery County—Greeting:

Before our COURT OF CRIMINAL APPEALS, on the 20th day of February A.D. 1974, the cause upon appeal to revise or reverse your Judgment between ELIJAH W. RATCLIFF Appellant, No. 47,600

vs.

The State of Texas, Appellee, was determined; and therein our said COURT OF CRIMINAL APPEALS made its order in these words:

"This cause came on to be heard on the transcript of the record of the court below, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, but that there was error in pronouncing judgment upon the appellant, the judgment is reformed.

"TO COMPLY WITH THE JURY'S VERDICT ASSESSING A DEFINITE PENALTY OF SIX YEARS CONFINEMENT IN THE TEXAS DEPARTMENT OF CORRECTIONS"

It is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the appellant pay all costs in this behalf expended, and that this decision be certified below for observance."

LEAVE TO FILE APPELLANT'S MOTION FOR REHEARING IS DENIED

WHEREFORE, We command you to observe the order of our said COURT OF CRIMINAL APPEALS in this behalf and in all things to have it duly recognized, obeyed and executed.

WITNESS, the HON. JOHN F. ONION, JR., presiding Judge of our said COURT OF CRIMINAL APPEALS, with the Seal thereof annexed, at the City of Austin, this 22ND day of FEBRUARY A.D. 1974.

GLENN HAYNES
Clerk.
Troy Bennett
Deputy Clerk

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IN THE DISTRICT COURT OF MONTGOMERY COUNTY, TEXAS

No. 11064
October 10, 1972

The State of Texas
vs.
Elijah W. Ratcliff

This day this cause being again called, the State appeared by her District Attorney, and the defendant Elijah W. Ratcliff, was brought into open Court in person, in charge of the Sheriff, for the purpose of having the sentence of the law pronounced in accordance with the* verdict and judgment herein rendered and entered against him on a former day of this term. And thereupon the defendant Elijah W. Ratcliff was asked by the Court whether he had anything to say why said sentence should not be pronounced against him and he answered nothing in bar thereof. Whereupon the Court proceeded, in the presence of the said defendant Elijah W. Ratcliff to pronounce sentence against him as follows:

It is the order of the Court that the defendant Elijah W. Ratcliff who has been adjudged to be guilty of Theft and whose punishment has been assessed by the* verdict

* Insert the words applying:
Verdict of the Jury
or
Judgment of the Court

of the jury at confinement in the penitentiary for Six (6) years, be delivered by the Sheriff of Montgomery County, Texas, immediately to the Director of Corrections of the Texas Department of Corrections, or other person legally authorized to receive such convicts, and the said Elijah W. Ratcliff shall be confined in said penitentiary for a term of not less than Two (2) years nor more than Six (6) years in accordance with the provisions of the law governing the penitentiaries and the Texas Department of Corrections. And the said Elijah W. Ratcliff is hereby remanded to jail until said Sheriff can obey the directions of this sentence.

J. S. Holleman
Judge Presiding

Judgment of Conviction—Not Guilty

BE IT REMEMBERED, That on Monday, the 17th day of July 1972, there came on and was held a regular term of the Honorable District Court of Montgomery County, Texas, at the Court House thereof, at Conroe, Texas.

Present and presiding: Hon. J. S. Holleman, Judge, Criminal District Court of Montgomery County; Ellis A. Qualline, Jr., District Attorney; R. J. Gray, District Clerk, and A. E. Reaves, Sheriff.

N. 11064
July 26th, 1972
Indicted for THEFT

The State of Texas
vs.
Elijah W. Ratcliff

THIS DAY this cause was called for trial, and the State appeared by her District Attorney, and the Defendant Elijah W. Ratcliff appeared in person and by Counsel, and both parties announced ready for trial; and the Defendant in open Court pleaded not guilty to the charge contained in the Indictment herein; and thereupon a jury, to-wit:

Fred E. Wilson and eleven others, was duly selected, empaneled and sworn, according to law, who, having heard the indictment read, and the defendant's plea of not guilty thereto; and having heard the evidence submitted, and having been duly charged by the Court, retired in charge of the proper officer, the Defendant being present, and in due form of law returned into open Court the following verdict, which was received by the Court, and is here now entered upon the minutes of this Court, to-wit:

"We the jury find the defendant Elijah W. Ratcliff guilty as charged.

/s/ Fred E. Wilson, Foreman"

It is, therefore, considered and adjudged by the Court that the Defendant Elijah W. Ratcliff is guilty of the offense of Theft as found by the jury, and that he be punished, as has been determined, by confinement in the State penitentiary for a term of Six (6) years, and that the State of Texas do have and recover of said Defendant Elijah W. Ratcliff all costs in the prosecution expended, for which execution will issue, and that said Defendant be remanded to jail to await the further order of this Court herein.

APPENDIX B

UNITED STATES CODE, CONST. AMEND. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

UNITED STATES CODE, CONST. AMEND. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

UNITED STATE CODE, CONST. AMEND. XIII

1. Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

2. Congress shall have authority to enforce this article by appropriate legislation.

UNITED STATES CODE, CONST. AMEND. XIV

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for the President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath as a member of Congress, or as an officer of the

United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two thirds of each house, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

UNITED STATES CODE, CONST. AMEND. XV

1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

2. The Congress shall have power to enforce this article by appropriate legislation.

TITLE 28, UNITED STATES CODE, SECTION 2241

Power to Grant Writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial. (As amended by the Act of May 24, 1949.)

TITLE 28, UNITED STATES CODE, SECTION 2242
Application

Application for a writ of habeas corpus shall be in writing and signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held.

TITLE 28, UNITED STATES CODE, SECTION 2243
Issuance of Writ; Return; Hearing; Decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

TITLE 42, UNITED STATES CODE, SECTION 1981
Equal Rights Under the Law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of parties.

TITLE 42, UNITED STATES CODE, SECTION 1982
Property Rights of Citizens

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

TITLE 42, UNITED STATES CODE, SECTION 1983
Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (R.S. Sec. 1979).

TITLE 42, UNITED STATES CODE, SECTION 1984
Same; Review of Proceedings

All cases arising under the provisions of this Act in the courts of the United States shall be reviewable by the Supreme Court of the United States, without regard to the sum in controversy, under the same provisions and regulations as are provided by law for the review of other causes in said court.

TITLE 42, UNITED STATES CODE, SECTION 1985
Conspiracy To Interfere With Civil Rights

(1) Preventing officer from performing duties. If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court or from testifying to any matter pending therein freely, fully, and in any such court, or to injure such party or witness in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the law;

(3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege, of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. (R.S. Sec. 1980).

TITLE 42, UNITED STATES CODE, SECTION 1986

Same; Action for Neglect To Prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in Section 1985 of this Title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representative, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action accrued. (R.S. Sec. 1981).

TITLE 42, UNITED STATES CODE, SECTION 1987

Prosecution of Violation of Certain Laws

The United States attorneys, marshals, the commissioners appointed by the district and territorial courts, with power to arrest, imprison or bail offenders, and every other officer who is especially empowered by the President, are authorized and required at the expense of the United States to institute prosecutions against all persons violating any of the provisions of Section 1990 of this Title or of Sections 5506 to 5516 and 5518 to 5532 of the Revised Statutes, and to cause such persons to be arrested, and imprisoned or bailed for trial before the court of the United States or the territorial court having cognizance of the offense. (R.S. Sec. 1982).

TITLE 42 UNITED STATES CODE, SECTION 1988

Proceedings in Vindication of Civil Rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights and for vindication, shall be exercised and enforced in accordance with the laws of the United States so long as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. (R.S. Sec. 722).

TITLE 42, UNITED STATES CODE, SECTION 1989

Commissioners; Appointment of Persons To Execute Warrants

The district courts of the United States and the district courts of the Territories, from time to time, shall increase the number of commissioners, so as to afford a speedy and convenient means for the arrest and examination of persons charged with crimes referred to in Section 1987 of this Title; and such commissioners are authorized and required to exercise all the powers and duties

conferred on them herein with regard to such offenses in like manner as they are authorized by law to exercise with regard to other offenses against the laws of the United States. Said commissioners are empowered, within their respective counties, to appoint, in writing, under their hands, one or more suitable persons, from time to time, who shall execute all such warrants or other process as the commissioners may issue in the lawful performance of their duties, and the persons so appointed shall have authority to summon and call to their aid the bystanders or posse comitatus of the proper county, or such portion of the land or naval forces of the United States, or the militia, as may be necessary to the performance of the duty with which they are charged; and such warrants shall run and be executed anywhere in the State or Territory within which they are issued. (R.S. Sec. 1983, 1984).

TITLE 42, UNITED STATES CODE, SECTION 1990

Marshal To Obey Precepts; Refusing To Receive or Execute Process

Every marshal and deputy marshal shall obey and execute all warrants or other process, when directed to him issued under the provisions of Section 1989 of this Title. Every marshal and deputy marshal who refuses to receive any warrant or other process when tendered to him, issued in pursuance of the provisions of this section, or refuses or neglects to use all proper means diligently to execute the same, shall be liable to a fine in the sum of $1,000, for the benefit of the party aggrieved thereby. (R.S. Sec. 1985, 5517).

TITLE 42, UNITED STATES CODE, SECTION 1991

Fees; Persons Appointed To Execute Process

Every person appointed to execute process under Section 1989 of this Title shall be entitled to a fee of $5 for each party he may arrest and take before any commissioner with such other fees as may be deemed reasonable by the commissioner for any additional services necessarily performed by him, such as attending at the examination, keeping the prisoner in custody, and providing him with food and lodging during his detention, and until the final determination by the commissioner; such fees to be made up in conformity with the fees usually charged by the officers of the courts of justice within the proper district or county, as near as may be practicable, and paid out of the Treasury of the United States on the certificate of the judge of the district within which the arrest is made, and to be recoverable from the defendant as part of the judgment in case of conviction. (R.S. Sec. 1987).

TITLE 42, UNITED STATES CODE, SECTION 1992

Speedy Trial

Whenever the President has reason to believe that offenses have been, or are likely to be committed against the provisions of Section 1990 of this Title or of Section 5506 to 5516 and 5518 to 5532 of the Revised Statutes, within any judicial district, it shall be lawful for him, in his discretion, to direct the judge, marshal, and United States attorney of such district to attend at such place within the district, and for such time as he may designate, for the purpose of the more speedy arrest and trial of persons so charged, and it shall be the duty of every judge or other officer, when any such requisition is received by him to attend at the place and for the time therein designated. (R.S. Sec. 1988).

TITLE 42, UNITED STATES CODE, SECTION 1993

(Repealed Sept. 9, 1957)

TITLE 42, UNITED STATES CODE, SECTION 1944

Peonage Abolished

The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in any Territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of any Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any person as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void. (R.S. Section 1990).

TITLE 42, UNITED STATES CODE, SECTION 1995

Criminal Contempt Proceedings; Penalties; Trial by Jury

In all cases of criminal contempt arising under the provisions of this Act, the accused, upon conviction, shall be punished by fine or imprisonment or both: *Provided however,* That in case the accused is a natural person the fine to be paid shall not exceed the term of six months:

Provided further, That in any such proceeding for criminal contempt, at the discretion of the judge, the accused may be tried with or without a jury: *Provided further, however,* That in the event such proceeding for criminal contempt be tried before a judge without a jury and the sentence of the court upon conviction is a fine in excess of the sum of $300 or imprisonment in excess of forty-five days, the accused in said proceeding, upon demand therefore, shall be entitled to a trial de novo before a jury, which shall conform as near as may be to the practice in other criminal cases.

This section shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice nor to the misbehavior, misconduct, or disobedience, of any officer of the court in respect to the writs, orders, or process of the court.

Nor shall anything herein or in any other provision of law be construed to deprive courts of their power, by civil contempt proceedings, without a jury, to secure compliance with or to prevent obstruction of, as distinguished from punishment for violations of, any lawful writ, process, order, rule, decree, or command of the court in accordance with the prevailing usages of law and equity, including the power of detention.

V.T.C.A., BUS. & C. §2.601

§2.601. Buyer's Rights on Improper Delivery

Subject to the provisions of this chapter on breach in installment contracts (Section 2.612) and unless otherwise agreed under the sections on contractual limitations of remedy (Sections 2.718 and 2.719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may

(1) reject the whole; or

(2) accept the whole; or

(3) accept any commercial unit or units and reject the rest.

(59th Legis., Ch. 721, Sec. 2—601.) Acts 1967, 60th Leg., vol. 2, p. 2343, ch. 785, §1.

V.T.C.A., BUS. & C. §2.606

§2.606. What Constitutes Acceptance of Goods

(a) Acceptance of goods occurs when the buyer

(1) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity; or

(2) fails to make an effective rejection (Subsection (a) of Section 2.602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

(3) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

(b) Acceptance of a part of any commercial unit is acceptance of that entire unit. (59th Legis., Ch. 721, Sec. 2—606.) Acts 1967, 60th Leg., vol. 2, p. 2343, ch. 785, §1.

V.T.C.A., BUS. & C. §2.608

§2.608. Revocation of Acceptance in Whole or in Part

(a) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it

(1) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or

(2) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(b) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(c) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them. (59th Legis., Ch. 721, Sec. 2—608.) Acts 1967, 60th Leg., vol. 2, p. 2343, ch. 785, §1.

V.T.C.A., BUS. & C. §2.721

§2.721. Remedies for Fraud

Remedies for material misrepresentation or fraud include all remedies available under this chapter for non-fraudulent breach. Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy. (59th Legis., Ch. 721, Sec. 2—721.) Acts 1967, 60th Leg., vol. 2, p. 2343, ch. 785, §1.

V.T.C.A., BUS. & C. §3.409

§3.409. Draft Not an Assignment

(a) A check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it.

(b) Nothing in this section shall affect any liability in contract, tort or otherwise arising from any letter of credit or other obligation or representation which is not an acceptance. (59th Legis., Ch. 721, Sec. 3—409.) Acts 1967, 60th Leg., vol. 2, p. 2343, ch. 785, §1.

V.T.C.A., BUS. & C. §3.417

§3.417. Warranties on Presentment and Transfer

(a) Any person who obtains payment or acceptance and any prior transferor warrants to a person who in good faith pays or accepts that

(1) he has a good title to the instrument or is authorized to obtain payment or acceptance on behalf of one who has a good title; and

(2) he has no knowledge that the signature of the maker or drawer is unauthorized, except that

this warranty is not given by a holder in due course acting in good faith

(A) to a maker with respect to the maker's own signature; or

(B) to a drawer with respect to the drawer's own signature, whether or not the drawer is also the drawee; or

(C) to an acceptor of a draft if the holder in due course took the draft after the acceptance or obtained the acceptance without knowledge that the drawer's signature was unauthorized; and

(3) the instrument has not been materially altered, except that this warranty is not given by a holder in due course acting in good faith

(A) to the maker of a note; or

(B) to the drawer of a draft whether or not the drawer is also the drawee; or

(C) to the acceptor of a draft with respect to an alteration made prior to the acceptance if the holder in due course took the draft after the acceptance, even though the acceptance provided "payable as originally drawn" or equivalent terms; or

(D) to the acceptor of a draft with respect to an alteration made after the acceptance.

(b) Any person who transfers an instrument and receives consideration warrants to his transferee and if the transfer is by indorsement to any subsequent holder who takes the instrument in good faith that

(1) he has a good title to the instrument or is authorized to obtain payment or acceptance on

behalf of one who has a good title and the transfer is otherwise rightful; and

(2) all signatures are genuine or authorized; and

(3) the instrument has not been materially altered; and

(4) no defense of any party is good against him; and

(5) he has no knowledge of any insolvency proceeding instituted with respect to the maker or acceptor or the drawer of an unaccepted instrument.

(c) By transferring "without recourse" the transferor limits the obligation stated in Subsection (b) (4) to a warranty that he has no knowledge of such a defense.

(d) A selling agent or broker who does not disclose the fact that he is acting only as such gives the warranties provided in this section, but if he makes such disclosure warrants only his good faith and authority. (59th Legis., Ch. 721, Sec. 3—117.) Acts 1967 60th Leg., vol. 2, p. 2343, ch. 785, §1.

V.T.C.A., BUS. & C. §4.303

§4.303. When Items Subject to Notice, Stop-Order, Legal Process or Setoff; Order in Which Items May be Charged or Certified

(a) Any knowledge, notice or stop-order received by, legal process served upon or setoff exercised by a payor bank, whether or not effective under other rules of law to terminate, suspend or modify the bank's right

or duty to pay any item or to charge its customer's account for the item, comes too late to so terminate, suspend or modify such right or duty if the knowledge, notice, stop-order or other legal process is received or served and a reasonable time for the bank to act thereon expires or the setoff is exercised after the bank has done any of the following:

(1) accepted or certified the item;

(2) paid the item in cash;

(3) settled for the item without reserving a right to revoke the settlement and without having such right under statute, clearing house rule or agreement;

(4) completed the process of posting the item to the indicated account of the drawer, maker or other person to be charged therewith or otherwise has evidenced by examination of such indicated account and by action its decision to pay the item; or

(5) become accountable for the amount of the item under subsection (1) (d) of Section 4.213 and Section 4.302 dealing with the payor bank's responsibility for late return of items.

(b) Subject to the provisions of subsection (1) items may be accepted, paid, certified or charged to the indicated account of its customer in any order convenient to the bank.

V.T.C.A., BUS. & C. §4.403

Customer's Right to Stop Payment; Burden of Proof of Loss

(a) A customer may by order to his bank stop payment of any item payable for his account but the order must be received at such time and in such manner as to afford the bank a reasonable opportunity to act on it prior to any action by the bank with respect to the item described in Section 4.303.

(b) An order is binding upon the bank only if it is in writing, dated, signed, and describes the item with certainty. An order is effective for only six months unless renewed in writing.

(c) The burden of establishing the fact and amount of loss resulting from the payment of an item contrary to a binding stop payment order is on the customer. (59th Legis., Ch. 721, Sec. 4.403.) Acts 1957, 60th Leg., vol. 2, p. 2343, ch. 785, section 1.

VERNON'S ANN. CIV. ST., ART. 3713, RULE 5

Evidence must relate to facts in issue and to relevant facts.

VERNON'S ANN. CIV. ST., ART. 3713, RULE 6

Facts are relevant when so connected with a fact in issue as to form part of the same transaction or subject matter.

VERNON'S ANN. P. C., ART. 1410
(Now Repealed)

Theft is the fraudulent taking of Corporeal personal property belonging to another from his possession or from

the possession of some person holding the same for him, without his consent, with intent to deprive the owner of the value of the same, and to appropriate it to the use and benefit of the person taking.

VERNON'S ANN. P. C., ART. 1413
(Now Repealed)

The taking must be wrongful, so that if the property came into the possession of the person accused of theft by lawful means, the subsequent appropriation of it is not theft, but if the taking, though originally lawful, was obtained by any false pretext, or with any intent to deprive the owner of the value thereof, and appropriate the property to the use and benefit of the person taking, and the same is so appropriated, the offense of theft is complete.

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 78-1870

Elijah W. Ratcliff,
Petitioner-Appellant

vs.

William J. Estelle, Jr., Director of the Texas Department of Corrections,
Respondent-Appellee

NOTICE OF REVIEW AND REQUEST FOR TRANSMITTAL OF CERTIFIED RECORD

To the Honorable United States Court of Appeals for the Fifth Circuit and the Honorable Mark White, Attorney General of Texas:

Elijah W. Ratcliff, Petitioner-Appellant, Pro Se, in the above entitled and numbered Appeal, hereby, gives notice that such party intends to seek a review of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered herein on the 20th day of June, A.D., 1979, improperly refusing to reverse

an order by the United States District Court for the Southern District of Texas, CA No. H-77-1542, as consolidated with Civ. No. 75-H-1975 from the same United States District Court and numbered as No. 78-1870 upon the granting of a Certificate of Probable Cause in the more recent proceeding wherein Petitioner-Appellant, Pro Se, sought a writ of habeas corpus against Respondent-Appellee, William J. Estelle, Jr., Director of the Texas Department of Corrections.

Jurisdiction for the review sought is vested by *Title 28, United States Code, Section 1254(1),* such review being sought from the Supreme Court of the United States.

REQUEST FOR RECORD

Petitioner-Appellant, Pro Se, requests the Clerk of the United States Court of Appeals for the Fifth Circuit to certify the complete record under Appeal No. 78-1870 as filed and as requested by the parties that such complete record be filed in the United States Court of Appeals for the Fifth Circuit and transmit such complete record forthwith to the Clerk of the Supreme Court of the United States at Washington, D.C. 20543 for filing and proper review.

Witness my hand this 2nd day of July, A.D., 1979.

(s) Elijah W. Ratcliff
Petitioner-Appellant, Pro Se
Elijah W. Ratcliff
P. O. Box 862
Livingston, Texas 77351
Ph. 713 327-4948

AFFIDAVIT OF SERVICE

State of Texas
County of Polk

Petitioner-Appellant, Pro Se, states under penalties of perjury as if executed before a proper notary public for such County and State that a copy of the foregoing Notice of Review and Request for Transmittal of Certified Record was served this 2nd day of July, A.D., 1979, on the Honorable Mark White, Attorney General of Texas, Supreme Court Building, Austin, Texas 78711, by first class United States Mail.

(s) Elijah W. Ratcliff
Affiant

SCHEDULE OF ABBREVIATIONS FOR RECORD

Reference to Record	*Abbreviation*
Court of Criminal Appeals of Texas on Appeal, Direct, No. 47,600	No. 47,600
Court of Criminal Appeals of Texas on Application for Writ of Habeas Corpus, No. 4624	No. 4624
Page	p.
Pages	pp.
Statement of Facts from State trial Court	SF
Transcript	Tr.
United States Court of Appeals, Fifth Circuit, No. 72-3127	No. 72-3127, U.S.C.A., 5th Cir.
United States District Court, Southern District of Texas, Houston Division, CA No. 75-H-1945	CA No. 75-H-1945, US DC SD TX
United States District Court, Southern District of Texas, Houston Division, CA No. H-77-1542	CA No. H-77-1542, US DC SD TX